Supreme Court, U.S.
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No. 03-763

IN THE

Supreme Court of the United States

VIDEO PIPELINE, INC.,

Petitioner,

v.

BUENA VISTA HOME ENTERTAINMENT, INC.
and MIRAMAX FILM CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in upholding, on an interlocutory appeal, a preliminary injunction against Petitioner, where Petitioner conceded that its unauthorized, for-profit streaming of excerpts from Respondents' copyrighted movies over the internet, in competition with Respondents' authentic movie trailers, presented a *prima facie* case of copyright infringement, and Petitioner failed to establish a likelihood of success on its affirmative defense of "fair use."

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Buena Vista Home Entertainment, Inc. ("BVHE") is a wholly-owned subsidiary of Disney Enterprises, Inc. ("DEI"), which is a wholly-owned subsidiary of The Walt Disney Company, a publicly traded corporation. Respondent Miramax Film Corporation ("Miramax"), is a wholly-owned subsidiary of Disney Interfinance Corp., which is a wholly-owned subsidiary of DEI.

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R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* (8th ed. 2002) 8, 11

17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (2d ed. 2003) 8, 9, 11

STATEMENT OF THE CASE

Petitioner has described the case in a manner that bears little resemblance to the case that it presented to the courts below. Before this Court, Petitioner portrays its service, which streams excerpts of Respondents' copyrighted home video works over the internet to retailers' web sites, on a fee-per-megabyte viewed basis, as being some form of "reference catalog" or "research guide." To carry off this makeover, Petitioner omits certain dispositive facts and legal conclusions at the heart of the decisions below. Pursuant to Supreme Court Rule 15.2, which admonishes that it is counsel's obligation to point out in the brief in opposition to certiorari, and not later, any misstatements of fact or law "that bear on what issues would properly be before the Court if certiorari were granted," Respondents make this counter-statement of the case.

A. *The Parties*

Respondent BVHE is in the business of producing, distributing, marketing and selling home video versions of copyrighted motion pictures from the Disney studios (including Walt Disney Pictures, Touchstone and Hollywood Pictures) as well as from Respondent Miramax. Petitioner Video Pipeline, Inc. compiles movie "trailers" – *i.e.*, promotional previews created by or under the authority of a movie's copyright owner – and distributes them to home video retailers for display in their "brick and mortar" stores. To obtain the right to distribute the trailers for BVHE's products, Video Pipeline entered into a "Master Clip License Agreement" ("License Agreement") with BVHE in 1988, which among other things provided that the trailers would be used only for in-store use. (29a) BVHE thereafter provided Petitioner with hundreds of trailers for exhibition in retail home video stores as part of preview reels. (2a-3a)

B. *Trailers Are Valuable Internet Entertainment Content*

With the emergence of the internet, movie trailers have become more than just advertising material for the underlying theatrical or home video products. They have become valuable entertainment content in their own right. They increase web site traffic by attracting visitors and enhance web site "stickiness" – that is, visitors enjoying trailers will stay longer at a particular site and thereby give the web site owner additional opportunities to market other products and services. (17a)

Respondents use their own authentic trailers to attract visitors to their internet web sites, where they advertise, cross-market and cross-sell other products, and to obtain valuable marketing information from visitors who voluntarily chose to register at the site or make a purchase there. Respondents have also entered into agreements to provide trailers to web sites of other businesses, such as Apple Computer, in cross-promotional arrangements. (5a)

C. *Petitioner's Infringing Conduct*

Recognizing the commercial value on the internet of the movie trailers in its possession, Petitioner began offering to its clients a new service – streaming trailers, for a fee, as enhancements to its clients' retail internet websites. In general, customers visiting the retailers' websites can view trailers by clicking on the "preview" button for a particular motion picture, which links them immediately to videopipeline.net, which then "streams" the individual trailer to the customer from Petitioner's server while the visitor is still on the retailer's website. Petitioner charges its retailer-clients a "per megabyte viewed" fee for streaming individual trailers, based on the actual viewership of the trailers. (3a)

Without authorization, Petitioner included on its internet service Respondents' movie trailers, which had been provided to Petitioner solely for in-store use under the License Agreement. On September 13, 2000, Respondents advised Petitioner that it did not have permission to use the trailers on the internet, that they had not been cleared for online use and that they should be removed immediately. In response, on October 24, 2000, Petitioner filed this action in the United States District Court for the District of New Jersey seeking a declaratory judgment that its online use of the trailers did not violate federal copyright law. Respondents counterclaimed for copyright infringement. (4a)

At Respondents' request Petitioner removed some of Respondents' trailers from its internet service, but replaced them with so-called "clip previews" of its own creation. (Consistent with the Court of Appeals' usage, "trailers" is used herein to mean authentic previews created or authorized by the copyright holders and "clip previews" to mean unauthorized previews created by Petitioner.) To create its clip previews, Petitioner selected scenes from each of at least 62 of Respondents' movies, copied them, and spliced them together into segments of about two minutes in length, comparable to the length of an authentic trailer. Each clip preview displayed a studio trademark at the beginning, also in a fashion comparable to an authentic trailer. (4a) The clip previews were distributed by Petitioner in the very same way as the authentic trailers had been used: *i.e.*, as enhancements to its clients' retail websites, streamed for a per megabyte fee for viewing by website visitors. (46a)

While Petitioner used the clip previews on the internet as substitutes for authentic trailers, the clip previews were of markedly poorer quality. Trailers are designed to entice

sales from a target market by using techniques such as voice-over, narration, editing and additional music. Petitioner's clip previews used none of these marketing techniques – but rather consisted of a few unedited scenes taken verbatim from Respondents' copyrighted movies. (4a-5a)

Respondents moved to preliminarily enjoin Petitioner from creating and distributing over the internet these totally unauthorized clip previews of Respondents' movies. Although Petitioner continued to also use authentic trailers on its internet service without authorization from Respondents, that conduct was not the subject of the preliminary injunction motion, or of the decision below which Petitioner seeks to have this Court review.

D. *The Decisions Below*

Before the District Court, Petitioner conceded the *prima facie* elements of copyright infringement, but sought to defend its creation and streaming of clip previews by portraying itself as a bulwark protecting "15,000 independent retailers" (*Video Pipeline's Brief Opposing Buena Vista Home Entertainment's and Miramax Film Corporation's Motion for Preliminary Injunction*, at 3) against "large institutions with great resources." (*Transcript of August 10, 2001 Preliminary Injunction Hearing*, at 140) The District Court fully and carefully considered Petitioner's defenses, which were a mélange of "first sale," misuse of copyright, fair use, first amendment, and antitrust concepts, all wrapped in the mantle of "retailer's rights," and granted Respondents preliminary injunctive relief. (37a-64a) While Petitioner repeatedly asserts before this Court that the District Court made a factual finding that the clip previews "increase overall sales" of the underlying copyrighted works, the District Court actually

found that "it is likely that the previews Video Pipeline provides for its retailer customers may harm the market for the copyrighted motion picture, either due to the quality of the previews or because of its flawed representations." (54a)

On appeal to the United States Court of Appeals for the Third Circuit, Petitioner discarded the bulk of its "retailer rights" theories in favor of a fair use defense based upon the Seventh Circuit's intervening opinion in *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512 (7th Cir. 2002), arguing that its clip previews "complement" Respondents' full length movies by promoting them rather than supplanting them as "substitutes." Petitioner also attempted to use the Ninth Circuit's intervening opinion in *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *superseded*, 336 F.3d 811 (9th Cir. 2003), to support an argument that its service was a type of "search engine" that improved access to authentic copyrighted materials on the internet.

In rejecting Petitioner's arguments, the Court of Appeals recognized that movie trailers have become valuable intellectual property in their own right, beyond the underlying movies they promote, and accordingly that Petitioner's use of Respondents' copyrighted material undeniably harmed the market for authentic trailers. (16a-18a) Indeed, the court expressly held that "[i]n light of Video Pipeline's commercial use of the clip previews and Disney's use of its trailers . . . we easily conclude that there is a sufficient market for, or other value in, movie previews such that the use of an infringing work could have a harmful effect" on the market for authentic trailers (17a), and that "internet users searching for previews of Disney films may be drawn by the clip previews to web sites other than Disney's, depriving Disney of the opportunity to advertise and sell other products to those users." (17a-18a) (footnote omitted)

The Court of Appeals also considered and rejected Petitioner's attempt to analogize itself to an internet search engine: "VideoPipeline.net does not improve access to authorized previews located on other web sites. Rather, it indexes and displays unauthorized copies of copyrighted works." (11a-12a) Notably, Petitioner did not present any evidence or argument in the courts below that its internet service had ever been used as a "reference catalog" or "research index," or indeed for any purpose other than promoting retail sales of home videos.

Meanwhile, on August 7, 2003, the District Court, on a full record following completion of discovery, granted partial summary judgment in favor of Respondents as to Petitioner's liability for copyright infringement with respect to both the clip previews that were the subject of the preliminary injunction decisions, as well as Video Pipeline's other infringing activities, which were not. (The summary judgment ruling is reported at 275 F. Supp.2d 543 (D.N.J. 2003).) The case remains before the District Court for further proceedings on relief, including permanent injunction, damages and attorneys' fees.

REASONS FOR DENYING THE PETITION

First, the interlocutory nature of the District Court's ruling militates against review by this Court. This is especially true where, as here, during the pendency of the appeal of the preliminary injunction, summary judgment on liability has been entered by the District Court on a full record. Granting review at this juncture would deny this Court the benefit of the comprehensive adjudication of all issues on a full record.

Second, Petitioner asks this Court to review, and ultimately reverse, a judgment of the Court of Appeals on the basis of a freshly-minted "reference catalog/research index" theory that was not presented to the Court of Appeals and for which no record was developed in the District Court. This Court should not depart from its ordinary practice of declining to consider a question presented in a petition for certiorari that has not been considered by the lower courts.

Third, the Court of Appeals' decision is fully in accord with the recent decisions of the Seventh Circuit, *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512 (7th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003), and Ninth Circuit, *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *superseded*, 336 F.3d 811 (9th Cir. 2003), as well as this Court's precedents. Petitioner's arguments to the contrary are misplaced. Neither *Ty, Inc.* nor *Kelly* supports the proposition that unauthorized copying that, as here, supplants a derivative work or potential derivative work in the market is a fair use.

Finally, Petitioner suggests that the Court of Appeals' decision "sets a precedent that devastates research guides containing copyrighted materials." In fact, it does nothing of the sort. The decision below simply means that Petitioner's commercial enterprise cannot profit from selling internet access to content literally clipped from Respondents' copyrighted works, supplanting authentic movie trailers (which concededly are derivative works under 17 U.S.C. § 106(2)). The Court of Appeals' decision reflects a fact-specific, straightforward application of well-established principles of copyright law, and the deference ordinarily accorded to district courts in the grant or denial of preliminary injunctive relief.

Accordingly, Respondents respectfully urge this Honorable Court to deny the Petition for a Writ of Certiorari.

I.

THIS COURT SHOULD NOT REVIEW AN INTERLOCUTORY APPEAL OF A PRELIMINARY INJUNCTION, ESPECIALLY WHERE SUMMARY JUDGMENT HAS SUBSEQUENTLY BEEN ENTERED ON A FULL RECORD

This Court's practice is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for writ of certiorari). Certiorari jurisdiction is "to be exercised sparingly . . . [a]nd, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384-85 (1893) (Court should review interlocutory order by writ of certiorari only if "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967). The interlocutory nature of the order under review, alone, may be sufficient reason to deny it. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; *see also* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari"); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4036

(2d ed. 2003). The soundness of this policy is self-evident: a grant of certiorari before final judgment denies this Court the benefit of a fuller record and the deliberations of the lower courts.

Adherence to this practice is especially appropriate here. The Court of Appeals found that it had subject matter jurisdiction to review the preliminary injunction under 28 U.S.C. § 1292(a)(1), governing interlocutory appeals. (5a) As the Court of Appeals noted, however, during the pendency of the appeal, "the District Court entered summary judgment in [Respondents'] favor as to various claims and counterclaims, some of which overlap with what is before us." (5a) Although the Court of Appeals found that the appeal was not technically moot because the preliminary injunction had not been superseded by entry of a permanent injunction, it would be a poor use of this Court's resources to rule piecemeal on one aspect of Petitioner's fair use defense on a partial, preliminary injunction record, when a comprehensive adjudication of all issues on a full record is already wending its way through the courts.

This case presents no occasion to depart from the prudential rule against certiorari review of interlocutory orders. The action had already proceeded through discovery and to the entry of summary judgment even before the Court of Appeals affirmed the preliminary injunction, without any "extraordinary inconvenience or embarrassment." Petitioner points to no urgency or threat of irreparable harm in the absence of immediate relief from the preliminary injunction, which has now been in effect for nearly two years. Indeed, at no point during the appellate process did Petitioner seek a stay of the preliminary injunction from the District Court, the Court of Appeals, or this Court.

If, as Petitioner contends, any "fair use" issues presented by this case (only a subset of which were raised and decided in the preliminary injunction proceeding) are of sufficient public importance to be worthy of review by writ of certiorari, then that review should be informed by the full deliberations of the lower courts on the full record after final judgment. For this reason alone, the petition to review the affirmance of the interlocutory decree should be denied.

II.

NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE QUESTION PRESENTED BY THE PETITION

This Court does not ordinarily decide questions that have not been presented to the courts below. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34-35 (2001) ("We do not reach this issue because it was not raised or briefed below."); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 759-60 (1995); *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("ordinarily this Court does not decide questions not raised or resolved in the lower court[s]."); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) ("This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question . . . that question was

not raised in the Court of Appeals and is not properly before us."); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977) ("This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here."); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976); *see, e.g.*, 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, §4036 ("Within the framework of the appellate record, it remains the general rule that new questions may not be raised for the first time on Supreme Court review."); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 6.26, at 421 (8th ed. 2002).

Petitioner frames the issue in this case as whether the inclusion of excerpts from full-length copyrighted audiovisual works on a "comprehensive interactive reference catalog, accessible via the Internet" constitutes fair use. (Petition at i) Petitioner then prefaces its argument with "A Brief History of Cataloging's Importance" and asserts that the Court of Appeals' ruling casts doubt on the legitimacy of every research guide or index to copyrighted works. It chides the Court of Appeals for "devaluing the overriding research aspects of Video Pipeline's indexed guide." (Petition at 17) Yet no such reference to Petitioner's service as a "comprehensive interactive reference catalog" or "indexed guide" appears anywhere in the District Court or Court of Appeals opinions. Nor do any of the other terms that Petitioner variously uses to describe its service before this Court, such as "interactive electronic guide" or "comprehensive research and information guide," or "electronic index of previews" or even "movie research web site." This is not because the courts below ignored Petitioner's evidence or arguments, but rather because Petitioner has abandoned those arguments, based upon the

unsuccessful "retailers' rights" theory it pursued below, and now attempts to "reinvent" its case as something heretofore unknown in the proceedings.

Before the District Court, Petitioner presented itself as the defender of the supposed right of retailers to market copyrighted home video products (including by copying, streaming and exhibiting portions thereof over the internet) free of any restrictions imposed by the copyright owner.[1] It argued that "the purpose and character of the use of the Video Pipeline previews is to assist home video retailers exercise their rights under the first sale and fair use doctrines." (*Video Pipeline's Brief Opposing Buena Vista Home Entertainment's and Miramax Film Corporation's Motion for Preliminary Injunction*, at 15-16) The District Court aptly summarized the evidentiary record, showing that Petitioner portrayed itself as a service for home video retailers that wanted to show promotional previews on their websites, not as a reference catalog or research index:

> Plaintiff has created and placed clip previews on its website in order to be streamed by customers of its retailer clients. Such actions have the commercial purpose of advertising and promoting the video sales and rentals of the motion picture from which the excerpts were taken. Although plaintiff emphasizes that it served a functional

1. Consistent with this approach, the amici who appeared in support of Video Pipeline in the District Court were not academic or research-oriented organizations, but rather were two home entertainment retailer trade associations, the Video Software Dealers Association and the National Association of Recording Merchandisers. (28a) These amici did not participate in the proceedings before the Third Circuit.

> purpose for its retailer clients, many of whom did not have the resources to create their own video previews, the purpose of plaintiff's video previews are nevertheless to promote the video sales and rentals for profit. Plaintiff charged its retailer clients for providing access to and the streaming of the video previews on a per-megabyte basis. (46a) (footnote omitted)

Indeed, in its opening brief before the Court of Appeals, Petitioner asserted that the case presented a very different question from that posed by its Petition to this Court:

> Video Pipeline uses home video clip previews to show them to people upon their request at the point-of-sale via a search engine over the Internet to assist home video retailers who lawfully sell and rent home videos. Did the District Court err in concluding that Video Pipeline's use of the clip previews violates the Copyright Act? (*Appellant Video Pipeline's Brief*, at 1)

In short, even at the appellate level, Petitioner described this as a case turning upon the issue of whether the purported right of Petitioner's clients to sell home videos shielded Petitioner's unauthorized creation and sale of video clips to those clients to promote their business, not a case concerning indexed catalogs or research guides.[2] To the extent Petitioner

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2. Petitioner states without even bothering to suggest any evidentiary support in the record – since there is none – that "[s]ince the proceedings below, Video Pipeline's internet catalog of previews is also used by the public library systems in Seattle, Washington and Denver, Colorado to promote the public's access to their video (Cont'd)

attempted on appeal to portray itself somewhat more euphemistically as a "search engine," the Court of Appeals soundly rejected that characterization. The Court stated: "As used with retailers' web sites, Videopipeline.net does not improve access to authorized previews located on other web sites. Rather, it indexes and displays unauthorized copies of copyrighted works." (11a-12a) Petitioner does not argue that the Court of Appeals erred in so holding, but instead seeks to recast itself as the provider of some sort of educational reference tool.

Thus, Petitioner brings to this Court a theory that was not presented to the Court of Appeals and for which no record was developed in the District Court.[3] Even if this Court were

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(Cont'd)
collections." (Petition at 4, n.9) Petitioner's reliance on such matters outside the record is not only improper, but also very revealing of the chasm that separates the question it seeks to present to this Court and the record that it created below.

3. Petitioner suggests that its "videodetective.com" website is a "movie research web site" that enables "the public to obtain information about movies and home videos by title, actor, scene, genre, etc." (Petition at 4) (footnote omitted) Of course, this case was never about Petitioner providing information about movies – which it does not do – but only about the use of the movies' copyrighted expression itself. The Court of Appeals specifically stated that "[w]ere Video Pipeline dealing only in this type of information, the fair use doctrine might not be implicated at all because copyright protection does not include facts and ideas, but only their expression." (10a, n.5) (citation omitted) In the District Court, moreover, videodetective.com was not portrayed as an informational resource for the public, but as a marketing vehicle for internet home

(Cont'd)

to conclude that the abstract question of law that Petitioner seeks to present would be worthy of consideration, the Court should await a case and record that actually raise it. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."); *Lytle v. Household Mfg. Co.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determination is not a sensible exercise of this Court's discretion.").

(Cont'd)
entertainment retailers wishing to use movie previews to promote sales:

> Videodetective.com uses . . . demonstrates to home video retailers how they can market using Promotional Previews and assists Video Pipeline's existing retail clients in selling to the public by means of a "shop now" button linked to their retail web sites. (*Affidavit of Jed Horovitz Opposing Motion for Preliminary Injunction*, ¶ 20).

III.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Petitioner argues that its petition should be granted to resolve a purported "conflict" among the Court of Appeals decision below and recent decisions of the Seventh Circuit, *Ty, Inc.*, and Ninth Circuit, *Kelly*. In reality, no such conflict exists. Each of these Courts of Appeals simply applied a well-established legal framework for "fair use" analysis to a unique set of facts before it, and the results are readily reconcilable.

A. *Ty, Inc. v. Publications International Ltd.*

In *Ty, Inc.*, the Seventh Circuit reversed the grant of summary judgment for copyright infringement against the publisher of books that contained photographs of "Beanie Babies," well-known stuffed animals that are copyrighted as "sculptural works." The defendant argued that the books were "collectors' guides," and the Beanie Baby photographs were indispensable to the creation of a marketable collectors' guide to Beanie Babies. The plaintiff conceded that a true collectors' guide is not a derivative work, but argued that what had been published by the defendant was merely a collection of Beanie Baby photographs.

In considering these arguments, the court analyzed the issue as follows:

> [P]hotographs of Beanie Babies are conceded to be derivative works, for which there may be a separate demand that Ty may one day seek to

> exploit, and so someone who without a license from Ty sold photographs of Beanie Babies would be an infringer of Ty's sculpture copyrights. The complication here is that the photographs are embedded in text, in much the same way that quotations from a book are embedded in a review of the book.
>
> * * *
>
> [A] collectors' guide is very much like a book review, which is a guide to a book and which no one supposes is a derivative work. Both the book review and the collectors' guide are critical and evaluative as well as purely informational; and ownership of a copyright does not confer a legal right to control public evaluation of the copyrighted work.

Ty, Inc. at 519-521.

Applying this analytical framework, the Seventh Circuit observed that some of the books appeared to be very close to mere collections of unauthorized Beanie Baby photographs – infringing derivative works – while others were closer to being analogous to book reviews and thus could arguably be fair use because they contained a substantial amount of evaluative text along with the accompanying photographs. *See Ty, Inc.* at 519-520. Contrary to Petitioner's characterization of the Seventh Circuit's decision, however, that court did not find that the use of the photographs at issue was a fair use. Rather, the court remanded the entire case for further consideration – notwithstanding the court's articulated belief that at least some of the books on their face appeared

to fall outside any arguable scope of fair use (an aspect of the decision Petitioner studiously ignores) – because the parties had failed to analyze each of the books separately against applicable fair use standards. *See Ty, Inc.* at 523.

Here, the Court of Appeals was not dealing with some speculative derivative work for which there *may* be a separate demand that BVHE *may* one day seek to exploit. As the Court of Appeals recognized, this case involves derivative works that *already exist* and for which there is clearly a demand. As Petitioner acknowledges, the court in *Ty, Inc.* recognized that "[c]opying that substitutes for . . . [a] derivative work (as defined by the Copyright Act) is not a fair use." (Petition at 24) The Court of Appeals here held that:

> In light of Video Pipeline's commercial use of the clip previews and Disney's use of its trailers as described by the record evidence, we easily conclude that there is a sufficient market for, or other value in, movie previews such that the use of an infringing work could have a harmful effect under the fourth [fair use] factor.

(17a)

Moreover, Petitioner's clip previews cannot be equated to anything even close to a collectors' guide or some other evaluative work. The clip previews are exploitative and appropriative, rather than transformative commentaries or evaluations. As Petitioner repeatedly concedes, the clip previews are devoid of any comments, criticism, or separate creative input – there is nothing "critical and evaluative," to use Judge Posner's phrase, suggesting fair use. *Ty, Inc.* at 521. For that matter, Petitioner has repeatedly acknowledged

that its purpose in making and marketing the clip previews was not to evaluate, report on, or criticize the movies, but rather to sell the clip previews for use on retailers' websites for the promotion of the movies from which the clip previews were derived. This is one of the very purposes served by Respondents' authentic trailers. Petitioner's clip previews supplant an existing derivative work and thus do not constitute a fair use.

Both Petitioner's contention that *Ty, Inc.* supports its fair use defense and its contention that it conflicts with the decision below are without merit.

B. *Kelly v. Arriba Soft Corp.*

In *Kelly*, the Ninth Circuit considered the use of copyrighted photographs by a visual search engine on the internet. The Arriba Soft search engine at issue displayed the results of a user's query as a "low[]-resolution" "thumbnail" image of the copyrighted photographs, which served as links to the web sites where the original photographs could be found, such as that of the photographer Kelly. The Ninth Circuit found that the use of the small, low-resolution copies of the photographs as thumbnails in the search engine results was a fair use.

In reaching its result, the Ninth Circuit heavily emphasized the first and fourth factors of the fair use analysis, *i.e.*, "purpose and character of the use," 17 U.S.C. § 107(1), and market harm, 17 U.S.C. § 107(4). On the first factor, the Ninth Circuit found that notwithstanding the commercial nature of the use, "it was more incidental and less exploitative in nature than more traditional types of commercial use," and that "Arriba was neither using Kelly's images to directly

promote its web site nor trying to profit by selling Kelly's images." *Kelly* at 818. Consequently, the Ninth Circuit found that "[b]ecause the use of Kelly's images was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use." *Kelly* at 818.

On the fourth factor, the Ninth Circuit recognized that several potential markets existed for Kelly's images, including use in attracting Internet users to his website "where he sells advertising space as well as books and travel packages." *Kelly* at 821. Importantly – and totally unlike Petitioner's web sites – the thumbnail images in *Kelly* "would guide users to [the copyright owner's] web site rather than away from it," *Kelly* at 821, because of certain linking information displayed for the copyright owner's site. And, "[t]he thumbnails would not be a substitute for the full-sized images." *Kelly* at 821. Thus, the court found no market harm.

Here, on the other hand, Petitioner's licensing of its clip previews leads internet users away from Respondents' websites and sites to which Respondents' trailers are licensed – a current, not potential, market for Respondents' trailers. And, Petitioner is licensing its clip previews, just as Respondents are licensing their trailers. As the Third Circuit noted:

> [W]eb sites wishing to show previews of Disney movies may choose to enter licensing agreements with Video Pipeline rather than Disney, as at least 25 have already done. And internet users searching for previews of Disney films may be drawn by the clip previews to websites other than Disney's, depriving Disney of the opportunity to advertise and sell other products to those users.

(17a-18a) (footnote omitted)

In short, Petitioner's attempt to analogize its internet service to collectors' guides, critical reviews or search engines, and thereby contrive a conflict between the decision below and either *Ty, Inc.* or *Kelly* does not withstand scrutiny. The Court of Appeals' decision in this case is fully in accord with those decisions.

IV.

THE COURT OF APPEALS' DECISION REFLECTS A STRAIGHTFORWARD APPLICATION OF WELL-ESTABLISHED PRINCIPLES OF COPYRIGHT LAW IN THE CONTEXT OF LIMITED REVIEW OF A PRELIMINARY INJUNCTION

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Here the Court of Appeals correctly stated the well-established statutory framework for fair use analysis, and it is only its application of that law to the facts at hand that this Court is being asked to review. Moreover, the standard of review of the grant of a preliminary injunction in the Court of Appeals, as in this Court, is highly deferential. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction . . . constituted an abuse of discretion").

Indeed, the gist of Petitioner's argument seems to be that the Court of Appeals applied the applicable legal standard *too* rigidly, without regard to the underlying purpose of the

Copyright Act. The argument flies in the face of the text of the Court of Appeals' decision. Quoting this Court's decision in *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417 (1984), the Court of Appeals stated: "[A]s we apply copyright law, and the fair use doctrine in particular, we bear in mind its purpose to encourage 'creative activity' for the public good." The Court of Appeals then noted that, "where the copier uses none of his own creative activity to transform the original work, holding the fair use doctrine inapplicable will not likely interfere with copyright's goal of encouraging creativity." (8a-9a)

The Court of Appeals applied the fair use factors set forth in 17 U.S.C. § 107 – "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," "the nature of the copyrighted work," "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market for or value of the copyrighted work" – to the specific facts of this case in a fashion consistent with precedents of this Court and other courts of appeals, mindful of the purposes of both copyright protection and the fair use exception, and found that Petitioner utterly failed to establish a likelihood that it would prevail on the elements of its affirmative defense of fair use. While Respondents firmly believe that decision was correct, even if there were an error in the court's assessment that would not present a question worthy of this Court's review by writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petitioner For A Writ of Certiorari should be denied.

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